SUPREME COURT, U. S.

JUL 21 1967

JOHN F. DAVIS, CLERK

No. 403

Supreme Court of the United States

OCTOBER TERM, 1967

SOUTHERN RAILWAY COMPANY, *Petitioner*,

v.

FRANKLIN J. CHAMBERS, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CHARLES A. HORSKY
701 Union Trust Building
Washington, D. C. 20005

GERALD KIRVEN
BEN J. TALBOTT, JR.
501 South Second Street
Louisville, Kentucky 40202
Counsel for Petitioners

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Involved	2
Statutes Involved	2
Statement	2
Reasons for Granting the Writ	6
Conclusion	10
Appendix	i

AUTHORITIES

Cases:

Allegheny County v. *Mashuda Co.*, 360 U.S. 185 ..... 6, 7, 8
Chesapeake & Ohio Ry. Co. v. *City of Maysville*, 24 Ky. L. Rep. 615, 69 S.W. 728 (1902) 7
City of Shively v. *Illinois Central Railroad Co.*, 349 S.W.2d 682 (Ky., 1961), *appeal dismissed*, 369 U.S. 120 ..... 7, 9
City of Versailles v. *Kentucky Highland R.R. Co.*, 153 Ky. 83, 154 S.W. 388 (1913) 7
Meredith v. *Winter Haven*, 320 U.S. 228 6
Stefanelli v. *Minard*, 342 U.S. 117 ..... 6, 8
Ward v. *Louisville & N.R.*, 402 S.W.2d 98 (Ky. 1966) 9
Willcox v. *Consolidated Gas Co.*, 212 U.S. 19 6

Statutes:

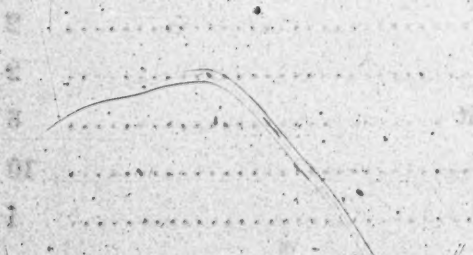
Kentucky

Ky. Rev. Stat.:

Sec. 96.070 ..... 2, *et seq.*
Sec. 277.065 ..... 2, *et seq.*

City of Jeffersontown

Ordinance No. 451 (1966) ..... 2, *et seq.*



Supreme Court of the United States

OCTOBER TERM, 1967

No.

SOUTHERN RAILWAY COMPANY, *Petitioner*,

v.

FRANKLIN J. CHAMBERS, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above case.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court filed December 22, 1966 (Appendix, pp. 18a-19a) are unreported. The opinion of the Court of Appeals for the Sixth Circuit, dated April 25, 1966 (*infra*, pp. v-vi) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1967 (*infra*, p. vi). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION INVOLVED

Whether, under the circumstances of this case and the decisions of this Court, petitioner was properly refused the aid of the Federal courts in the exercise of their diversity jurisdiction in challenging the validity of a local ordinance and of actions taken by local officials under the color thereof.

STATUTES INVOLVED

The relevant portions of the Kentucky Revised Statutes (Secs. 96.070 and 277.065), and the text of Ordinance No. 451, approved by the City Council of Jeffersontown on September 12, 1966, are set out in the Appendix, *infra*.

STATEMENT

Petitioner, a Virginia corporation with its principal office in the District of Columbia, filed its complaint in the United States District Court for the Western District of Kentucky on November 28, 1966, naming as defendants the City of Jeffersontown, a municipal corporation of the Fourth Class of the Commonwealth of Kentucky, and Franklin J. Chambers, its Mayor, William E. Cummings, its Police Judge, Herbert Meyer, its Police Chief, and Richard M. Troutwein, its City Attorney (Appendix, pp. 3a-10a). Respondents moved to dismiss the complaint on December 16, 1966 (Appendix, pp. 15a-16a), and on December 22, 1966, the motion to dismiss was granted (Appendix, p. 20a).

The allegations of the complaint, which are thus taken as admitted, may be summarized as follows:

Petitioner, a common carrier by railroad, constructed and has operated for many years a railroad line on which the crossing here involved in Jeffersontown, Kentucky is located. Recently, the crossing was widened and a school constructed in the vicinity.

On or about June 15, 1966, respondent Jeffersontown became a city of the Fourth Class. Shortly thereafter, under the purported authority of Section 96.070 of the Kentucky Revised Statutes (*infra*, p. i), Jeffersontown enacted Ordinance No. 451, effective September 15, 1966. The relevant sections of the Ordinance read as follows (the full text is attached to the complaint, and is set out *infra*, pp. ii-iv):

> "Section 1. That the Southern Railway Company shall within sixty (60) days from the effective date of this ordinance erect and maintain automatic safety gates for traffic at the grade crossing of Six Mile Lane and a railroad owned and operated by the Southern Railway Company, a Virginia corporation;"
>
> "Section 3. That all grade crossings and rights of way shall be so designed, graded and maintained as to provide from street level at a distance of fifty (50) feet from the center of the grade crossing a visual line of sight of not less than one hundred (100) yards to both the right and left to the center of said rights of way;"
>
> "Section 5. That all railroads are required to erect and maintain suitable signs visible by day and by night, and to place suitable markings at all grade crossings requiring all vehicles to come to a full stop before entering such grade crossings,

said signs to be approved by the Chief of Police of the City of Jeffersontown;"

"Section 9. That any person, persons or companies that violate any of the provisions of this ordinance shall be fined not less than Ten Dollars ($10.00) nor more than Fifty Dollars ($50.00) for each separate violation or for each day that there is failure to comply with the provisions of this ordinance."

The cost of erecting the automatic safety gates referred to in Section 1 of Ordinance 451 is approximately $18,000, and the annual maintenance charge is approximately $950. There would be added expenses involved in complying with Sections 3 and 5.

Section 277.065 of the Kentucky Revised Statutes (set out *infra*, pp. i-ii) provides, in part, as follows:

"The entire construction costs of projects for the elimination of hazards of railroad-highway crossings, including the separation or protection of grades at crossings, and reconstruction of existing railroad grade crossing structures, . . . including, but not limited to, the cost of preparing the plans and specifications and supervising the improvement, . . . shall be allocated between the railroad involved, and the governmental unit or units involved in the same ratio as the net benefit received by such railroad from the project bears to the net benefit accruing to the public using the highway, and in no case shall the net benefit to any railroad or railroads be deemed to be more than ten percent of the total benefit resulting from the project. . . . The cost of maintenance of all structures for the elimination of railroad grade crossings, and of installations for the protecting of existing grade crossings, constructed or installed under this section, shall be borne by the governmental unit or units constructing them. . . ."

Jeffersontown has appropriated no funds to meet the commitment required of it by Section 277.065 and does not intend to do so.

On November 20, 21, 22 and 23 criminal summons charging violations of Ordinance 451 were issued against petitioner, requiring that it appear in the Police Court of Jeffersontown on November 28, 1966. Respondents, in their official capacities, will continue to cite petitioner and otherwise attempt to impose Ordinance 451 unless they are enjoined.

The complaint prayed for (1) an injunction against issuing further criminal summons directed to petitioner pursuant to Ordinance 451, (2) an injunction against prosecuting petitioner pursuant to the Ordinance, (3) an injunction against having the trial of the summons already issued, and (4) a judgment that Sections 1, 3 and 5 of the Ordinance are, as applied to petitioner, invalid (Appendix, p. 7a).

Respondents' motion to dismiss the complaint was granted (Appendix, p. 20a). The District Court found that there was diversity of citizenship and that the amount involved exceeded $10,000 (Appendix, p. 18a), but declined to grant an injunction on the grounds (1) that it could not stay proceedings in the Jeffersontown Police Court because no act of Congress expressly authorizes such an injunction, and that in its discretion it should not enjoin a criminal proceeding in the Kentucky courts, (2) that petitioner would not suffer irreparable harm by refusing an injunction, and has an adequate remedy at law in the state courts, and (3) that there was no substantial Federal question involved (Appendix, p. 19a).

On appeal to the United States Court of Appeals for the Sixth Circuit the judgment was affirmed (*infra*,

pp. v-vi). The court held that the District Court properly refused petitioner relief because petitioner had an adequate remedy under the laws of Kentucky, and that *Stefanelli* v. *Minard*, 342 U.S. 117, precluded its interferenee with the pending or prospective criminal prosecutions.

REASONS FOR GRANTING THE WRIT

The decision below represents an extreme application of the so-called "abstention" doctrine which appears to be in conflict with decisions of this Court, particularly *Allegheny County* v. *Mashuda Co.*, 360 U.S. 185, and *Meredith* v. *Winter Haven*, 320 U.S. 228.

There can be no doubt that the District Court had jurisdiction, based on diversity of citizenship, to decide the controversy; indeed, the court specifically so found (Appendix, p. 18a). Petitioner was therefore entitled at its option, absent some exceptional circumstances, to assert its rights in the Federal rather than in the State courts. *Meredith* v. *Winter Haven*, *supra*, at pp. 234-235. As the Court said in *Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19, 40:

> "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different States or a question is involved which by law brings the case within the jurisdiction of a Federal court. The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."

The decision of the court below enunciates and applies a wholly different theory. Drawing, it appears,

on the traditional concepts limiting equity jurisdiction where there is an adequate remedy at law, the court approved the District Court's justification of its abstention—"in holding that appellant has an adequate remedy which it has not pursued under the laws of the Commonwealth of Kentucky" (*infra*, p. vi). This concept—that the right to have the controversy heard in the Federal courts is available only if and when remedies in the state courts are unavailable or have been exhausted—finds no sanction in any decision of this Court.

It may be conceded that petitioner has a remedy in the courts of Kentucky. Indeed, the case which is cited by the court below—*City of Shively* v. *Illinois Central Railroad Co.*, 349 S.W. 2d 682 (Ky., 1961), *appeal dismissed*, 369 U.S. 120—was a state court proceeding brought in circumstances similar to this, seeking an injunction against the enforcement of an ordinance which contained similar daily penalties for noncompliance. There are several other similar Kentucky cases in which the State courts have asserted their jurisdiction to restrain local officials from prosecuting under, and to enjoin enforcement of, local ordinances. See, *e.g.*, *Chesapeake & Ohio Ry. Co.* v. *City of Maysville*, 24 Ky. L. Rep. 615, 69 S.W. 728 (1902); *City of Versailles* v. *Kentucky Highland R.R. Co.*, 153 Ky. 83, 154 S.W. 388 (1913).

Under these circumstances, the conflict with the prior decisions of this Court could scarcely be more direct. In *Allegheny County* v. *Mashuda Co.*, *supra*, the Court agreed that the District Court had improperly declined jurisdiction, and reaffirmed that the doctrine of abstention was "an extraordinary and narrow exception to

the duty of a District Court to adjudicate a controversy properly before it" (360 U.S. at p. 188). Of particular importance here, however, is the fact that the Court found it significant that exactly the same suit as the plaintiff there had brought in the Federal court could have been brought in the State courts (see 360 U.S. at pp. 190, 191). Here, as there, to "order [petitioner] out of the federal court would accomplish nothing except to require still another lawsuit, with added delay and expense for all parties" (*Id.* at p. 196). There, as here, "[petitioner] exercised [its] right under 28 U.S.C. § 1332 to institute the equivalent suit in the District Court based on diversity of citizenship" (*Id.* at p. 191).

A similar comment is applicable to the apparent reliance by the court below on the decision in *Stefanelli* v. *Minard*, 342 U.S. 117. If the Kentucky courts are open to suits in equity to enjoin local officials from seeking to enforce challenged ordinances by levying cumulative fines, there is no reason why precisely similar actions should not be maintained in the Federal courts. Moreover, the judgment affirmed by the court below denied not only the prayers for relief against the criminal prosecutions in the Police Court, but also the separate prayer for a declaration of the invalidity of Sections 1, 3 and 5 of Ordinance 451—a prayer to which the *Stefanelli* case can have no possible application. That it might determine the invalidity of the action taken by the City of Jeffersontown, and that such a decision might be *res judicata* in later criminal proceedings in the State courts is clearly irrelevant. *Allegheny County* v. *Mashuda Co., supra,* at pp. 197-198.

None of the other exceptional bases for abstention are present. Assumption of jurisdiction in this case would not disrupt a State administrative process, or interfere with the collection of state taxes or the setting of rates for public utilities, or otherwise create needless Federal-state friction. 360 U.S. at pp. 189-190. The Federal court would simply be acting as would a court of the State of Kentucky in insisting on compliance with state law.

Since the courts declined to exercise jurisdiction, the merits of the complaint are, of course, irrelevant. A word on that subject may nevertheless be warranted by reason of the reference in the opinion of the court below to the *City of Shively* case, *supra,* which was dismissed by this Court for want of a substantial Federal question. The ordinance there sustained was in many respects similar to Ordinance 451. The complaint in this case, however, unlike that in *City of Shively,* asserts a ground for relief not discussed in the opinion in *City of Shively,* namely, the failure of the City of Jeffersontown to comply with the requirements of Kentucky Revised Statutes, Section 277.065. That section, quoted at page 4 above, expressly requires an allocation of the costs of eliminating the hazards of grade crossings between the railroad and the governmental units involved, with the former's share in no instance to exceed 10 percent. That Section 277.065 applies to the installation of signal devices at a grade crossing—the action required by Ordinance 451—has been settled by the Kentucky Court of Appeals. *Ward* v. *Louisville & N.R.,* 402 S.W.2d 98 (Ky. 1966). Ordinance 451 makes no provision for sharing of the costs by the City of Jeffersontown for the new crossing gates, and it stands admitted by the motion

to dismiss that the city has appropriated no money for this purpose and does not intend to do so. The local officials are thus deliberately flouting a requirement imposed by the state law.

CONCLUSION

WHEREFORE, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES A. HORSKY
701 Union Trust Building
Washington, D. C. 20005

GERALD KIRVEN
BEN J. TALBOTT, JR.
501 South Second Street
Louisville, Kentucky 40202
Counsel for Petitioners

July 1967